6-29-2009

State v. Johnson Appellant's Brief Dckt. 35635

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 35635
	)	
v.	)	
	)	
LONNIE ROBERT JOHNSON,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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Nature of the Case

Lonnie Johnson was convicted by a jury of grand theft by possession of stolen property. The value used for the determination of the grade of the offense was the purported replacement value for brand new copper wires. The State presented no evidence that the market value for the wires actually taken could not be satisfactorily ascertained, nor did the State present evidence that the replacement cost proffered was of a similar quality, design and value of the wire alleged to have been stolen – wire that was possibly over one hundred years old. The district court entered a restitution order upon Mr. Johnson's conviction for $2,000, or the approximate value of the replacement cost for new wires as testified to by one of the State's witnesses at trial.

Mr. Johnson timely appeals from his judgment of conviction and sentence and asserts: (1) that there is insufficient evidence to support the jury's verdict in this case; (2) that the jury was improperly instructed, and that the district court's jury instructions relieved the State of its burden of proof as to some of the material elements of the offense, thereby resulting in fundamental error; (3) that the district court erred, and violated Mr. Johnson's constitutional rights to compulsory process and to present an adequate defense, when the court completely excluded one of the defense witnesses as a sanction for a discovery violation; (4) that the prosecutor committed misconduct that rose to the level of a fundamental error; (5) that the district court erred when it awarded restitution in the amount of $2,000; and (6) under the cumulative error doctrine, the multitude of errors in this case require reversal of Mr. Johnson's conviction.

Statement of the Facts and Course of Proceedings

Officer Dan Milovanovic, an officer with the Union Pacific Railroad, received a call that some signal wires used by the railroad appeared to have been stolen. (Tr., p.119, Ls.3-9; p.124, Ls.1-4.) When he arrived at the location, near Dietrich, Idaho, he could see that some of the wires were cut and hanging down from the poles to which they were attached. (Tr., p.124, Ls.9-20.) Officer Milovanovic also saw a pile of cut train signal wires on the ground that were readily observable because of the bright green patina on the wire. (Tr., p.124, Ls.16-20.)

Next to the pile of wires was a tee shirt that had the initials "L.J." printed inside of the collar. (Tr., p.124, L.21 – p.125, L.1.) As the officer continued to look around the area, he also found a plastic bag that contained garbage. (Tr., p.125, Ls.8-15.) In addition to the garbage, however, the bag also contained two receipts from Pacific Steel and Recycling for the sale of copper. (Tr., p.125, Ls.16-20.) Lonnie Johnson's name was on these receipts. (Tr., p.125, Ls.16-20.)

After collecting several items from the scene, Officer Milovanovic then went to Pacific Steel and Recycling to conduct further investigation. (Tr., p.139, L.25 – p.140, L.3.) He was able to identify what appeared to be signal wire used by Union Pacific in one of the bins for scrap metal. (Tr., p.142, Ls.2-10.) An employee at the recycling center also gave Officer Milovanovic a copy of receipts from sales that Mr. Johnson had previously made at the center. (Tr, p.142, L.11 – p.143, L.4.) According to Officer Milovanovic's testimony at trial, he was able to identify the signal wire from Union Pacific due to its gauge and because the wire was aged and covered in "old fiber tar insulation." (Tr., p.144, L.2 – p.147, L.17.)

After Officer Milovanovic completed his investigation at Pacific Steel and Recycling, he participated in Mr. Johnson's arrest. (Tr., p.152, L.10 – p.153, L.10.) At the time of his arrest, Mr. Johnson was driving a van that contained other wire alleged to belong to Union Pacific. (Tr., p.153, Ls.3-10.) Mr. Johnson was originally charged with grand theft by disposal of stolen property. (R., pp.32-33.) Subsequently, this charge was amended to grand theft by possession of stolen property. (R., pp.41-42.)

Prior to trial, Mr. Johnson challenged the sufficiency the evidence presented at the preliminary hearing to sustain this charge. (R., p.39.) Specifically, Mr. Johnson asserted that: the testimony at the preliminary hearing failed to establish that the market value of the copper wire was over $1,000; the State improperly relied on testimony regarding replacement value of the copper wire in contravention of I.C. § 18-2402(a); the proper market value of the wire was $665.05 – the price that was paid for the raw materials of the wire by the recycling center; and that, in the event that this amount was not deemed to be the proper market value, the default value of the wire should be deemed to be under $1,000 pursuant to I.C. § 18-2402(c). (R., pp.55-61.)

The district court denied Mr. Johnson's motion challenging the sufficiency of the evidence presented by the State at the preliminary hearing. (R., pp.80-90.) In doing so, the district court held that the price paid by the recycling company for the wire was a "salvage price," and that this price "typically" is not the same as market price. (R., p.87.) The district court provided no analysis or legal authority for this conclusion. After making this conclusion, the district court proceeded to hold that there was sufficient evidence "that would legally permit the Magistrate to conclude that the market value of the wire could not be satisfactorily ascertained and that the replacement value is a

reasonably close approximation of the design and quality of the destroyed item." (R., pp.87-88.) The district court then stated that the differences between the old wire that was allegedly stolen and the new, replacement wire were not substantial enough to preclude the use of the alleged replacement cost because "[i]t is only where there is 'little or no relationship' to the quality and value of the destroyed property that a fact-finder should not be allowed to consider replacement cost." (R., p.88.) Because both wires were made from copper, the district court concluded that the wires were sufficiently similar. (R., pp.88-89.)

At trial, Officer Milovanovic testified as to the circumstances that caused him to arrest Mr. Johnson for grand theft. (Tr., p.119, L.3 – p.163, L.16.) However, he also conceded that there was no direct evidence that Mr. Johnson had actually taken the wire from the signal poles, rather than merely finding the wire by the road. (Tr., p.164, L.10 – p.166, L.25.) The officer acknowledged that some of the wire that was taken was no longer being actively used by the railroad and had potentially been hanging from the poles for up to one hundred years. (Tr., p.172, L.16 – p.173, L.18.)

In addition to his testimony regarding the circumstances leading to Mr. Johnson's charges in this case, Officer Milovanovic also testified about some of Mr. Johnson's statements that were made in connection with charges he faced in Lincoln County. (Tr., p.156, L.23 – p.162, L.15.) Apparently, after talking with officers about some wire that was in his truck at the time of his arrest, Mr. Johnson made a vague statement that he "knew it was wrong," when he took the wire that was in his van on that day. (Tr., p.162, Ls.13-15.) The wire in question was not the subject of his charges at trial. (Tr., p.159, L.18 – p.160, L.21.) The district court had earlier ruled that evidence of the

surrounding circumstances of the other charge out of Lincoln County could be introduced at trial in order to support an inference that Mr. Johnson had knowledge that the wire that was the subject of the charges was stolen. (Tr., p.60, L.20 – p.67, L.23.)

The State also presented the testimony of an employee of Pacific Steel and Recycling, Russ Taylor. (Tr., p.175, Ls.14-18.) He testified that the recycling center took additional steps, mainly requiring a copy of the person's driver's license, when they engaged in transactions involving the sale of aluminum and copper because those items are sometimes stolen prior to being brought in for sale. (Tr., p.176, L.7 – p.177, L.18.) The recycling center also generates receipts showing the weight and type of metal, what was paid for it, and who brought the metal in for sale. (Tr., p.178, L.20 – p.179, L.17.) Mr. Taylor further testified that the copper processed for resale at their facility usually sold for between $3.10 and $3.25 per pound to the companies that bought copper from the recycling center. (Tr., p.189, Ls.1-10.) Another employee of the recycling center who processed the wire that Mr. Johnson brought in testified that Mr. Johnson represented that he acquired the wire from his brother when he passed away. (Tr., p.201, L.7 – p.203, L.2.)

Douglas Richard, an employee of Union Pacific Railroad, provided testimony regarding the costs to replace the missing wire with new wire. (Tr., p.219, L.21 – p.231, L.4.) According to Mr. Richard's calculations, the equivalent cost - based on the same amount of pounds of new wire as was allegedly sold by Mr. Johnson to Pacific Steel and Recycling – was approximately $2,000. (Tr., p.228, L.25 – p.231, L.4.) There was nothing in Mr. Richard's calculations that provided for the depreciation in value of the old wire that was actually taken and that could have been as much as 100 years old.

(Tr., p.228, L.25 – p.231, L.4.) Mr. Richards did acknowledge the difference in quality between the replacement wire and that which was allegedly stolen; and he further admitted that he did not know the difference in value between the wire as taken and the wire that could be purchased to replace it. (Tr., p.234, L.7 – p.235, L.25.)

At the close of the State's evidence, Mr. Johnson moved the district court, pursuant to I.C.R. 29, for a judgment of acquittal. (Tr., p.240, Ls.11-16.) In support of this motion, Mr. Johnson argued to the district court that the State's evidence in the form of the receipts showing what Mr. Johnson was paid for the wire established the market value of the copper wire. (Tr., p.241, L.23 – p.242, L.4.) Defense counsel asserted that Mr. Taylor's testimony regarding the amounts that the recycling center was paid by other purchasers for the copper would also establish a market value for the wire. (Tr., p.242, Ls.8-17) Given that the highest valuation for the resale of copper by the recycling center during the relevant time period was $3.25 per pound, this would make the market value for the copper, at most, $919.75. (Tr., p.242, Ls.8-17.) As such, the evidence showed that the market value of the wire was less than $1,000, and Mr. Johnson could only be guilty of petit theft. (Tr., p.242, Ls.8-17.)

In addition, Mr. Johnson asserted that the value presented by the State – the replacement cost measured by the cost of brand new wires that had to be purchased in volume – was an inappropriate measure because it was not an approximation of the quality and value of the wire that was actually taken. (Tr., p.242, L.18 – p.243, L.17.) Given this, Mr. Johnson asserted that this replacement cost should not be used as the measure for the degree of his offense. Finally, Mr. Johnson asserted that the State

failed to produce evidence that Mr. Johnson actually knew that the wire was stolen. (Tr., p.244, Ls.16-23.)

At the same time, Mr. Johnson also informed the district court that a defense witness, James Arterburn, who had been missing and whom defense counsel had been unable to locate, had contacted defense counsel earlier that day. (Tr., p.240, L.16 – p.241, L.3.) Mr. Johnson informed the court that Mr. Arterburn could testify that there were rolls of copper wire located behind Mr. Johnson's brother's house, which would corroborate Mr. Johnson's version of events regarding how he came to sell copper wire to Pacific Steel and Recycling. (Tr., p.241, Ls.4-9.) He could also testify as to the circumstances under which Mr. Johnson made one sale of copper wire under Mr. Arturburn's brother's name. (*See* State's Exhibit 9.)

With regard to Mr. Johnson's motion for a judgment of acquittal, the State asserted that there was no market value for the copper wire that was allegedly stolen because the recycling company did not sell the wire in the same form as it received the wire. (Tr., p.246, Ld.4-14.) The State's sole argument with regard to the replacement value offered at trial was that this purported cost was measured close in time to the alleged timeframe that the property was taken. (Tr., p.246, L.15 – p.247, L.1.) The State made no argument that the replacement wire was similar in type or quality to the wire that was alleged to have been stolen. (Tr., p.246, L.15 – p.247, L.1.) As to Mr. Johnson's knowledge, the State relied on the fact that Mr. Johnson's tee shirt and the bag containing the receipts from the recycling center were in such proximity to the area where the wire was taken as to support an inference of knowledge. (Tr., p.247, Ls.2-11.) The State further argued that Mr. Johnson had brought in wire that was

identified as wire belonging to the railroad based upon characteristics of gauge and oxidation. (Tr., p.247, L.12 – p.248, L.3.)

In response, Mr. Johnson pointed out that the amount that the Pacific Steel and Recycling Center paid for the wire was, itself, the market value. (Tr., p.248, Ls.5-11.) He also noted that simply because there was a very specific market for the copper wire did not lessen the fact that there was, in fact, a market. (Tr., p.248, Ls.5-24.)

The district court concluded that there was sufficient evidence from which the jury could find that Mr. Johnson had taken the wire that was alleged to have been stolen. (Tr., p.249, L.23 – p.251, L.8.) Regarding the valuation issue, the district court found that the salvage value of the wire was approximately $665. (Tr., p.251, Ls.9-11.) The court further found that the "resell salvage value" of the copper wire was approximately $919. (Tr., p.251, Ls.11-12.) Finally, the district court noted that the third proposed valuation was the estimate of replacement cost that was nearly $2,000. (Tr., p.251, Ls.23-24.) However, the district court ultimately found valuation to be an issue for the jury that was, in the court's view and without further explanation, somehow contingent on whether the jury believed that the wire taken was active signal wire or was instead inactive wire. (Tr., p.251, L.24 – p.252, L.8.)

When defense counsel asked for the opportunity to clarify the district court's ruling, the court denied her request, stating, "No. You made your argument, let me finish my comments." (Tr., p.252, Ls.9-11.)

After the district court's ruling denying the defense motion for a judgment of acquittal, the court then returned to the issue of whether Mr. Arterburn would be permitted to testify for the defense. (Tr., p.252, Ls.24-25.) Defense counsel clarified

that she had been aware of this witness, but had been unable to locate him as apparently Mr. Aterburn's phone had been disconnected. (Tr., p.253, Ls.5-8, 22-25.) While defense counsel had attempted to contact Mr. Aterburn through other people, it further appears that counsel's efforts were not availing until the morning of Mr. Johnson's request to present Mr. Arterburn's testimony after defense counsel was approached by Mr. Arterburn in the hallway of the courthouse. (Tr., p.253, L.22 – p.254, L.7.)

Defense counsel iterated for the district court the importance of Mr. Arterburn's testimony to the defense case. (Tr., p.254, L.7 – p.255, L.2.) Mr. Arterburn could corroborate Mr. Johnson's prior representations to the employees at the recycling center that the wire came from his deceased brother's property, rather than being from any of the signal poles owned by the Union Pacific Railroad. (Tr., p.241, Ls.4-9, p.254, Ls.7-9.) Mr. Arterburn had apparently seen the spools of copper wire behind Mr. Johnson's brother's house. (Tr., p.241, Ls.4-5.) Additionally, Mr. Arterburn and Randy Arterburn, his brother, had given Mr. Johnson permission to use their existing account at the recycling center to process one of his sales of copper wire. (Tr., p.241, Ls.6-9.) This was the reason that Randy Aterburn's name appeared on one of the receipts for the recycling center. (State's Exhibit 9.) In light of the fact that Mr. Arterburn had no apparent motivation to make up a story, defense counsel argued that the importance to Mr. Johnson's defense of Mr. Arterburn's corroboration was enormous. (Tr., p.255, Ls.10-23.)

The State objected to the presentation of this witness due to a lack of notice. Specifically, the prosecutor argued that she was never told by the defense that they

were still searching for a potential witness nor informed of Mr. Arterburn at all. (Tr., p.253, Ls.11-17.) Additionally, the State mentioned that the notice was extremely late and, "the state has already rested." (Tr., p.253, Ls.18-19.)

Because the State had requested discovery under I.C.R. 16, and because the defense admittedly did not provide Mr. Arterburn's name as a potential witness, the district court found that the disclosure was "way beyond late." (Tr., p.255, Ls.12-19.) The district court further found that defense counsel's inability to locate Mr. Arterburn as a witness did not excuse the obligation to also disclose him to the State. (Tr., p.256, Ls.5-12.) But rather than balance the potential prejudice to Mr. Johnson's ability to present a defense against the potential prejudice to the State, or consider lesser remedies, the district court denied Mr. Johnson's request to present Mr. Arterburn's testimony and concluded:

> It is the court's discretion to impose sanctions with regard to discovery violations. The pretrial order in this case required disclosure of witnesses to be completed long ago. I'm not going to permit Mr. Arterburn to testify in this case.

(Tr., p.256, Ls.13-17.)

Mr. Johnson testified on his own behalf at trial. (Tr., p.258, Ls.10-22.) In addition to other seasonal work, Mr. Johnson was a "scrapper" of various metals. (Tr., p.260, Ls.15-23.) This usually involved him taking trips to refuse dumps to look for the raw materials to be recycled – generally found in items such as bent pipes, old radiators, and scrap wires. (Tr., p.260, L.15 – p.261, L.12.) He would then do some minimal processing of these materials so as to prepare them to be sold to the recycling center. (Tr., p.13, Ls.13-24.) Mr. Johnson would often cut the pieces of metal into smaller

pieces because that made them easier to transport and because the recycling center preferred him to do so. (Tr., p.261, Ls.13-24.)

Mr. Johnson informed the jury that his brother had recently passed away in a motorcycle collision, which left Mr. Johnson in the position of having to take care of his brother's estate. (Tr., p.259, L.13 – p.260, L.4.) While taking a look at his brother's property, Mr. Johnson discovered some rolls of old, oxidized copper wire in the weeds next to a shop. (Tr., p.262, Ls.8-25.) He testified that there was nothing in particular about this wire that led him to believe that it was stolen. (Tr., p.263, Ls.1-3.) Mr. Johnson gathered up the wire, took it to where he was staying, and cut it into pieces so that he could fit it into his backpack and sell it to the recycling center. (Tr., p.263, Ls.7-15, p.264, Ls.3-7.) He took two different loads of copper wire from his brother's property in to Pacific Steel and Recycling to be sold. (Tr., p.263, Ls.10-24.)

On another occasion, Mr. Johnson was driving nearby to some railroad tracks when some wire became entangled in the undercarriage of his van. (Tr., p.264, L.14 – p.266, L.24.) After hearing the wire dragging underneath his van, Mr. Johnson stopped the van, got out, and saw that the wire beneath his van was copper. (Tr., p.266, Ls.8-19.) It looked like the wire had been abandoned, so Mr. Johnson decided that he would cut the length of wire into smaller pieces and transport it in his van. (Tr., p.266, Ls.21-24.) According to Mr. Johnson, the bag containing garbage, his tee shirt, and the receipts must have fallen out of his van at this time and been blown closer to the train tracks. (Tr., p.267, Ls.16-23.)

After the defense rested, the district court, outside of the presence of the jury, asked both Mr. Johnson and the State whether they had any objections or additions to

the proposed jury instructions. (Tr., p.302, L.2 – p.303, L.10.) Neither party did. (Tr., p.302, L.2 – p.303, L.10.) The district court provided a jury instruction indicating that "value," for purposes of determining whether the grand theft charge was established, was determined by:

> The market value of the property at the time and place of the crime, or if the market value cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.
>
> When the value of the property cannot be satisfactorily ascertained pursuant to any of the above standards, its value shall be deemed to be $1,000 or less.

(Tr., p.310, L.18 – p.311, L.1.)

The district court noted that the State bore the burden of establishing beyond a reasonable doubt that the alleged theft was a grand theft – that the value of the property alleged to have been taken was over $1,000. (Tr., p.309, L.17-21.) But the district court also instructed the jury that the State's burden of proof only extended to material elements of the offense as set forth in the court's instruction. (Tr., p.307, Ls.16-22.) And the district court never instructed the jury as to the legal definition of "market value," that the State bore the burden of establishing that market value could not be satisfactorily ascertained before they could consider any purported replacement costs, nor did the court instruct the jury that the State had to establish the similarity in quality, design, and value between the alleged property taken and the proffered replacement cost in order for the replacement cost to be the proper measure of the grade of the offense. (Tr., p.304, L.8 – p.314, L.23.)

In addition, the district court provided the following, non-pattern jury instruction:

> The instructions on reasonable doubt and the burden of proof to be carried by the State of Idaho do not require the State to prove every fact and

> every circumstance beyond a reasonable doubt. The burden of proof extends only to the material elements of the offense. These material elements are set forth in the following instruction.

(Tr., p.307, Ls.16-22; R., p.167.)

The district court then provided an instruction outlining the elements of theft by possession of stolen property. (Tr., p.307, L.23 – p.309, L.2; R., p.168.)

During closing arguments, the prosecutor asserted that, "... the defendant and [Officer Milovanovic] both I.D. the third batch that came in as Union Pacific Railroad wire because that was a different color than the wire the defendant brought in with the green tint." (Tr., p.318, Ls.16-20.) In actuality, Mr. Johnson had never conceded or identified any of the wire that he had brought in for sale at the recycling center as being from the Union Pacific Railroad. (Tr., p.258, L.10 – p.300, L.7.) In fact, Mr. Johnson had actually testified that there was nothing in any of the wire that he had found and sold that indicated anyone's ownership, and specifically nothing that would indicate to him that the wire belonged to Union Pacific. (Tr., p.299, L.23 – p.300, L.7.)

In addition, the prosecutor specifically highlighted those aspects of Mr. Johnson's testimony that would have been supported by the testimony of Mr. Aterburn had the district court not excluded him as a witness; and, in doing so, challenged the credibility of Mr. Johnson's version of events. (Tr,. p.322, L.3 – p.324, L.6.) Despite having been informed a few hours earlier that Mr. Aterburn could provide testimony regarding why Mr. Johnson was using Mr. Aterburn's brother's account with the recycling company, which would clarify why one of the receipts reflected Randy Aterburn's name as the person on the account, the prosecutor argued to the jury (who were completely unaware of this witness) that the presence of Randy Aterburn's name on the receipt was part of

an attempt by Mr. Johnson to mislead the recycling company. (Tr., p.322, L.3 – p.323, L.6.) During closing arguments, the prosecutor also attempted to cast doubt on Mr. Johnson's testimony that his brother had died, which was another fact that could have been verified by Mr. Aterburn. (Tr., p.323, L.14 – p.324, L.6.)

Finally, the prosecutor made the following statement to the jury:

> On a new note, ladies and gentlemen, the railroad is a long celebrated industry, but it is definitely in decline. There is a lot of competition out there these days. There is [sic] semis, boats, planes, and most of all technology, but that doesn't make it okay for thieves to be targeting railroad property. Railroad lines are not for scavengers and that is what the defendant is. He is a scavenger. He is a buzzard. His is picking off the bones of the railroad industry.

(Tr., p.330, L.25 – 331, L.8.)

The jury convicted Mr. Johnson of grand theft by possession of stolen property, and further found him guilty of the persistent violator sentencing enhancement. (Tr., p.386, Ls.17-18, p.399, Ls.9-17, R., pp.178, 180.) Upon being convicted of grand theft, Mr. Johnson filed another I.C.R. 29 motion for judgment of acquittal. (R., pp.190-200.) In this motion, Mr. Johnson alleged that there was insufficient proof to establish that, at the time he acquired it, the wire was stolen rather than abandoned by the railroad; that Mr. Johnson knew that the wire was actually stolen; that the value of the copper wire exceeded $1,000; and that the replacement value provided for the wire was an accurate measure given the differences between the wire taken and the replacement wire. (R., pp.190-200.)

At the hearing on this motion, Mr. Johnson pointed out directly that the State failed to prove that the market value could not be satisfactorily ascertained, and that the State presented no testimony or evidence whatsoever regarding the issue of market

value, but instead relied exclusively on evidence of the replacement cost of the wire. (Tr., p.411, L.20 – p.412, L.4.) As noted by Mr. Johnson, the State, "declared that the two values that were presented by the defense were simply salvage value, skipped right over market value and went to replacement cost without attempting to show that we couldn't determine what the market value was." (Tr., p.411, L.25 – p.412, L.4.)

In response, the State noted that these same arguments were made in support of Mr. Johnson's earlier motion for a judgment of acquittal, which was denied, and that the inferences from the evidence supported the jury's verdict. (Tr., p.416, L.12 – p.419, L.16.)

The district court denied Mr. Johnson's motion. (Tr., p.434, Ls.13-20.) Regarding the issue of sufficiency of the evidence that the property was abandoned, the district court noted that the jury's finding that Mr. Johnson was guilty of a theft would be directly contrary to a finding that the wires at issue were abandoned, and that there was evidence to support this finding. (Tr., p.426, L.20 – p.429, L.25.) The district court noted that the jury's verdict reflected an adverse credibility determination against Mr. Johnson given that they rejected his testimony about where he had found the wire. (Tr., p.430, Ls.1-16.)

As to Mr. Johnson's contentions regarding the issue of the valuation of the wire, the district court acknowledged that this was a close issue. (Tr., p.430, Ls.17-18.) Notably, the district court stated, "It's always been a troubling point in this case as to whether the wire that was taken down was an active line or an inactive line. I think the assumption being made is if it's an inactive line then it's worthless. I don't think anybody testified to that." (Tr., p.431, Ls.16-20.) However, because the segments of

the wire could not have been practicably spliced together to serve the purpose to which the railroad was using them, the district court determined that it was proper to use as the measure or value of the replacement costs. (Tr., p.433, Ls.4-17.)

During the sentencing hearing, the prosecutor originally requested an additional 30 days in order to consult with Union Pacific Railroad regarding restitution because she was "not exactly sure" of the amount of restitution that would be requested. (Tr., p.444, Ls.15-19.) Defense counsel asked for a hearing on the issue of restitution and agreed that the 30 days requested by the prosecution would be a reasonable amount of time in order to prepare. (Tr., p.445, Ls.2-6.) Despite the mutual request for 30 days, and the lack of any specific figure from the State as to the basis for restitution, the district court ordered restitution in the amount of $2,000 even. (Tr., p.448, Ls.14-17.) The district court then denied Mr. Johnson's request for a restitution hearing. (Tr., p.448, Ls.20-24.) Mr. Johnson asked the court to reconsider in light of the evidentiary issues at play. (Tr., p.449, Ls.3-10.)

The district court granted the motion, provided that Mr. Johnson submitted notice seeking the restitution hearing. (Tr., p.449, Ls.11-13.) The State then shifted its earlier posture and asserted that there was no reason why the restitution issue could not be decided at the sentencing hearing based upon the testimony given at trial. (Tr., p.455, Ls.16-21.) Mr. Johnson asked that he be allowed to cross-examine the State's witness who testified as to the replacement cost of the wire because it was still an open question as to whether the railroad ever intended to actually replace the full amount of wire – including the inactive wire – that was alleged to have been taken. (Tr., p.455, L.23 – p.457, L.8.) The district court then reversed itself and concluded:

> I'm going to reverse myself from what I said earlier. Frankly, I've heard the restitution argument in this case already about three times now. What I'm ruling in my discretion, which restitution is a discretionary function, is a $2,000 restitution.

(Tr., p.457, Ls.15-19.)

The district court sentenced Mr. Johnson to 14 years, with five years fixed, for his conviction of grand theft. (Tr., p.454, Ls.8-13; R., pp.205-208.) Mr. Johnson timely appeals from his judgment of conviction and sentence. (R., pp.205, 210.)

ISSUES

1. Was there insufficient evidence to support the jury's verdict of guilt on the charge of grand theft?

2. Did the district court err in failing to properly instruct the jury that the State bore the burden of proof to establish that the market value was not ascertainable; in failing to instruct the jury that, in order to use replacement value, the State first had to establish beyond a reasonable doubt that the replacement cost offered by the State was for property that was similar in quality, design, and value as that alleged to have been stolen; and further err in instructing the jury that the State did not have the burden to prove, beyond a reasonable doubt, facts other than those outlined by the district court?

3. Did the district court err, and violate Mr. Johnson's constitutional right to present an adequate defense and to compulsory process, when the court excluded an exculpatory defense witness as a discovery sanction?

4. Did the prosecutor commit misconduct rising to the level of a fundamental error when she referred to Mr. Johnson as a "scavenger" and a "buzzard;" and when she mischaracterized the substance of Mr. Johnson's testimony during closing arguments?

5. Did the district court err when the court awarded restitution in the amount of $2,000?

6. Does proper application of the cumulative error doctrine require reversal in this case?

ARGUMENT

I.

There Was Insufficient Evidence To Support The Jury's Verdict Of Guilt On The Charge Of Grand Theft

A. Introduction

In this case, the fact of the value of the wire was the determinative fact of whether Mr. Johnson was guilty of a misdemeanor, with a maximum statutory punishment of one year, or of a felony, with a maximum statutory punishment of 14 years. However, there were two other predicate factual findings that the jury had to make before it could reach the conclusion that Mr. Johnson was guilty of a felony. The only purported value that could elevate Mr. Johnson's offense to a felony was the replacement value as set forth by Mr. Richard's testimony. But, in order to apply the replacement value, the jury had to first find that the market value for the property could not be satisfactorily ascertained and then also find that the replacement cost submitted by the State was for property of like quality and value as that of the property taken. Because there was insufficient evidence to support a finding of either of these facts, there was insufficient evidence to support the jury's verdict on the charge of grand theft.

B. Standard Of Review

The standard of review upon a challenge to the sufficiency of the evidence to support a conviction is whether the jury's verdict is supported by substantial, competent evidence. *See, e.g., State v. Vandenacre*, 131 Idaho 507, 510, 960 P.2d 190, 193 (Ct. App. 1998). This Court will not overturn a conviction based upon insufficiency of the evidence where a rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt, nor will this Court substitute its own view of the evidence for that of the jury. *Id.* All evidence is viewed in the light most favorable to the State. *Id.* Further, matters regarding credibility of the witnesses, the weight of the testimony, and the reasonable inferences to be drawn therefrom are solely within the province of the jury. *Id.* "A judgment must be reversed, however, if the evidence is insufficient to support the conviction." *State v. Hughes*, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997).

Where, as here, a defendant elects to introduce evidence rather than to rely solely on a I.C.R. 29 motion for a judgment of acquittal, the defendant waives the right to limit this Court's review on appeal to the sufficiency of the evidence at the close of the State's evidence. *Id.* Rather, this Court reviews all of the evidence, including that offered by the defense, in determining whether there was sufficient evidence to sustain the conviction. *Id.*

C. There Was Insufficient Evidence To Support A Finding, Beyond A Reasonable Doubt, That Market Value Was Not Ascertainable Because The State's Own Evidence Established The Market Value Of The Copper Wire Alleged To Have Been Stolen And Because The State Presented No Evidence That Market Value Could Not Reasonably Be Ascertained

Under Idaho's statutory scheme for the grading of theft offenses, a theft constitutes a grand theft – as opposed to a misdemeanor petit theft – only if the State can prove beyond a reasonable doubt that the value of the property taken exceeded $1,000. I.C. §§ 18-2403(4); 18-2407(b)(1). The maximum sentence for grand theft is 14 years incarceration, while the statutory maximum sentence for petit theft is only one year. I.C. § 18-2408. "Value" is defined, under I.C. § 18-2402, as:

> ... the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.

I.C. § 18-2402(11)(a).

Apparent in this statutory scheme is that the grade of the theft offense depends on the value of the property alleged to have been stolen. The Idaho Court of Appeals has addressed the meaning of "market value" as that term is used in I.C. § 18-2402(11). *See State v. Smith*, 144 Idaho 687, 693, 169 P.3d 275, 281 (Ct. App. 2007). The court clarified that market value is defined as, "the reasonable price at which the owner would hold those goods out for sale to the general public." *Id.* Alternatively, "fair market value" can also be defined as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." BLACK'S LAW DICTIONARY, 1587 (8th ed. 2004).

Under the Sixth Amendment, any fact, other than a prior criminal conviction, which increases the maximum range of punishment that a defendant may receive for a criminal offense must be submitted to the jury and proved by the State beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Mullaney v. Wilbur*, 421 U.S. 684, 697-703 (1975). In light of these constitutional holdings, Idaho cases have recognized that any fact that a jury would have to find in order to increase the range of punishment faced by the defendant must be treated as an element of the offense for purposes of pleading and proof. *See, e.g., State v. Gerardo*, 147 Idaho 22, 30, 205 P.3d 671, 679 (Ct. App. 2009).

In this case, the fact of the value of the wire was the determinative fact of whether Mr. Johnson was guilty of a misdemeanor, with a maximum statutory punishment of one year, or of a felony, with a maximum statutory punishment of 14 years. And only the replacement cost proffered by the State could support a finding of guilt of grand theft, rather than petit theft. However, there were two other predicate factual findings that the jury had to make before it could reach the conclusion that Mr. Johnson was guilty of a felony. The only purported value that could elevate Mr. Johnson's offense to a felony was the replacement value as set forth by Mr. Richard's testimony. But, in order to apply the replacement value, the jury had to first find that the market value for the property could not be satisfactorily ascertained and that the replacement cost submitted by the State was for property of like quality and value as that of the property taken. As such, because these two facts had to be found before replacement value could be used to determine the grade of the offense by the State, the State had the burden of proving these facts beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490; *Mullaney*, 421 U.S. at 697-703; *accord State v. Martin*, 23 P.3d 216, 224-225 (Mont. 2001).

This is consistent with the Idaho Court of Appeals' Opinion in *State v. Hughes*, 130 Idaho 698, 703, 946 P.2d 1338, 1343 (Ct. App. 1997). The defendant in *Hughes* was charged with malicious injury to property, which, like theft, is graded according to the value of the property at issue in the charge. *Id.* at 702, 946 P.2d at 1342. The *Hughes* Court first determined that, when the property at issue has been completely destroyed, the fair market value of the property at the time and place of the property's

destruction is the proper measure of valuation. *Id.* at 703, 946 P.2d at 1343. While replacement value can be used in appropriate circumstances, the court held:

> ... replacement cost evidence may be used as an indicator of value only *when the State has demonstrated that the fair market value of the destroyed item is not reasonably ascertainable or that the item has no market value,* and when replacement cost evidence is relied upon, *the State must show that the replacement (whether actually purchased by the victim or not) is a reasonably close approximation of the design and quality of the destroyed item.*

Id.

There was insufficient evidence in this case that market value could not be satisfactorily ascertained. First, the State's own evidence demonstrated that there was, in fact, a market value for the copper wires and also established the value of the wires according to this standard. Second, even assuming that the State had not already presented evidence establishing the market value, the State presented no evidence that market value could not be satisfactorily ascertained.

Here, the State put into evidence receipts from the Pacific Steel and Recycling Company that demonstrated the actual market value for the wire – the price that a seller was willing to accept and a buyer was willing to pay for the property on the open market in an arm's-length transaction. (State's Exhibits 9, 13, 14.) The State produced these receipts as exhibits for the jury. (Tr., p.135, L.25 – p.136, L.2.) This market value was only approximately $665, far short of the threshold of over $1,000 required for a conviction of grand theft. (Tr., p.242, Ls.3-4; State's Exhibits 9, 13, 14.)

Other jurisdictions have similarly indicated that, where there is proof of the price received by the defendant for selling wires alleged to have been stolen, this proof is competent to establish the market value of the wire. *See Greene v. State*, 406 So.2d

805, 808 (Miss. 1981); *State v. Ott*, 763 P.2d 810, 811-813 (Utah Ct. App. 1988); *Loddy v. State*, 502 P.2d 194, 196 (Wyo. 1972); *see also Dyba v. State*, 549 S.W.2d 178, 180 (Tex. Crim. App. 1977).

In *Ott*, the defendant was charged with felony theft based upon the State's allegation that he had stolen and sold copper wire. *Ott*, 763 P.2d at 811-812. In support of its valuation of the copper wire, the State presented evidence of a sales receipt from the salvage company that had bought the wire, testimony regarding how much the specific wire was sold for, and testimony as to how much the salvage company paid for that type of wire at the time of the offense. *Id.* As does Idaho, Utah measures the value of property, for purposes of determining the grade of a theft offense, by market value. *Id.* at 813. Also like Idaho, Utah defines "market value" as the "measure of what the owner could expect to receive, and the amount a willing buyer would pay to the true owner of the stolen item." *Id.* Based upon these parameters, the *Ott* Court determined that the sale value of the wire to the salvage facility was an appropriate measure of the market value of the wire. *Id.* at 812-813.

Aside from the fact that the State's own evidence established the market value for the copper wire alleged to have been stolen, the State also presented no evidence that the market value for copper wire could not be satisfactorily ascertained. Instead, the State merely posited a blanket assertion that salvage value could not be used as market value and that the change in length or shape of the the wire somehow meant that the value of the copper comprising the wire was not a "market value." (Tr., p.326, L.25 – p.327, L.11.) It is axiomatic that the arguments of counsel are not competent evidence. *See, e.g., State v. Fondren*, 24 Idaho 663, 135 P. 265, 267 (1913). Because

the State presented no actual evidence in support of a claim that market value could not be satisfactorily ascertained, there was insufficient evidence to support the jury's verdict in this case.

This conclusion is consistent with the holdings of other jurisdictions with similar statutory schemes regarding the valuation of property for purposes of determining the grade of a theft offense. *See, e.g., State v. Ohms*, 46 P.3d 263, 266-267 (Mont. 2002); *Robinson v. State*, 686 So.2d 1370, 1373 (Fla. Dist. Ct. App. 1997). As noted by the court in *Robinson*:

> The record does not reflect that the state made any effort of showing that it could not "satisfactorily ascertain" the market value of the smoke detectors removed from the walls. This step was necessary to justify the value of the loss being ascertained by the cost of replacement of the property. The state failed to carry its burden of proof as to the value element under a grand theft charge.

Robinson, 686 So.2d at 1373.

The Montana Supreme Court similarly held that:

> ... the State failed to establish that the market value could not be satisfactorily ascertained. Instead, the State chose to rely exclusively on the replacement value to meet its burden of proof. The State failed to establish the necessary predicate to the use of replacement value for purposes of determining value under § 45-2-101(74)(a), MCA (1997). Accordingly, no rational trier of fact could have found the essential elements of felony theft, as defined by statute, beyond a reasonable doubt.

Ohms, 46 P.3d at 267.

D. There Was Insufficient Evidence To Support A Conclusion Beyond A Reasonable Doubt That The Replacement Value Put Forth By The State Was For Property That Was Similar In Quality, Design, And Value As That Of The Wire Alleged To Have Been Stolen

While Idaho appellate courts have not addressed the parameters of the use of replacement value for purposes of determining the grade of a theft offense, this issue has been addressed with regards to a charge of malicious injury to property where the property at issue has been completely destroyed as opposed to merely damaged. *See Hughes*, 130 Idaho at 702-704, 946 P.2d at 1342-1344. As previously noted, the *Hughes* Court held that, where the State seeks to use replacement cost as the measure of damages, the State bears the burden to show that the replacement cost proffered bears a reasonably close relationship to the quality and value of the property at issue in the charge. *Id.* In explaining this holding, the court noted:

> If the State attempts to prove value through replacement cost, however, we think it incumbent upon the State to produce some evidence that the replacement item is of a quality and design comparable to that of the destroyed item. This is so because a replacement actually purchased by the crime victim may bear little or no relationship to the quality and value of the destroyed property, and the classification of the offense as a felony or a misdemeanor should not turn upon the victim's choice between a higher quality, more expensive replacement and a lower quality, more modestly priced item.

Id. As such, the State must first prove that the replacement value being proffered bears a close relationship in quality, design, and value to the property alleged to have been stolen in order to use replacement cost as the measure of the grade of the offense.

This is in accord with the holdings of other jurisdictions that have similarly limited the use of replacement cost in the valuation of property for purposes of establishing the grade of a theft offense to a value that is similar in kind to that of the property taken.

See, e.g., People v. A.G., 605 P.2d 487, 488 (Colo. App. 1979); *Romero v. State*, 996 P.2d 894, 896-897 (Nev. 2000.). The Nevada Supreme Court in *Romero* noted:

> ... when the replacement cost is based upon current market price for an unused new item, such evidence alone is generally not sufficient to establish the monetary thresholds which distinguish between misdemeanor, gross misdemeanor, and felony property crimes. Such a rule is mandated by the language of the statute, which separates the various degrees of theft based upon the value of the property that was stolen, not the cost to replace the stolen property with a brand new item.

Romero, 966 P.2d at 896-897. Likewise, the Colorado court in *A.G.* reversed the defendant's conviction for felony theft due to insufficient evidence because neither the replacement value nor the original purchase price put forth by the State reflected the depreciation in value due to the age of the items alleged to be stolen. *A.G.*, 605 P.2d at 488.

Here, the State's own evidence established that the wires alleged to have been stolen were used in the telegraph service and could be approximately one hundred years old. (Tr., p.173, Ls.4-10.) The State's own evidence also established that there were significant differences in the quality and design of the wire alleged to have been taken and the wire used to calculate replacement cost. (Tr., p.235, Ls.1-25.) The wire alleged to have been taken was very old; oxidized and corroded; and parts of the wire were affixed with old tape, insulation, tar, and fibers. (Tr., p.235, Ls.1-16.) In contrast, the wire used to value replacement cost was brand new and covered with a plastic insulated coating, presumably to guarantee a lifetime of operability and use far in excess of that of the corroded old wires. (Tr., p.234, Ls.7-16.) Additionally, the State's own witness testified that he was unable to determine the difference in value between

the old wire and the new wire because he was not a "scrap dealer." (Tr., p.235, Ls.17-25.)

The replacement value proffered by the State in this case was, by the State's own evidence, not for property that was similar in quality, design, and value as that alleged to have been stolen. As such, the State did not meet its burden with regards to the presentation of an adequate replacement cost; and therefore the jury's verdict in this case was not supported by substantial and competent evidence.

E. The Default Value Of Property In Absence Of Proof Of Market Value Or Proper Replacement Cost Is Less Than $1,000

Under I.C. § 18-2402(11)(c), when the value of property cannot be satisfactorily ascertained wither through the market value of the property at the time and place of the crime, or by a proper measure of the replacement cost, "its value shall be deemed to be one thousand dollars ($1,000) or less." I.C. § 18-2402(11)(c). Assuming, *arguendo*, that this Court determines that the State had adduced sufficient proof to establish that the market value of the property could not be satisfactorily ascertained, and because the replacement cost proffered by the State was not representative of the quality and value of the property alleged to have been stolen, the default provisions of I.C. § 18-2402(11)(c) would then apply. This renders the default value of the property at issue in this case to be $1,000 dollars or less. As such, this Court should vacate Mr. Johnson's conviction for grand theft, along with the persistent violator enhancement, and remand this case for resentencing on the lesser offense of misdemeanor theft.

There was insufficient evidence in this case to support a guilty verdict on the charge of grand theft. Accordingly, Mr. Johnson asks that this Court vacate his

judgment of his conviction and remand his case for entry of a conviction on the lesser offense of misdemeanor theft. *See Hughes*, 130 Idaho at 704, 946 P.2d at 1344.

II.

The District Court Erred In Failing To Properly Instruct The Jury That The State Bore The Burden Of Proof To Establish That Market Value Was Not Ascertainable And Failing To Instruct The Jury That, In Order To Use Replacement Value, The State First Had To Establish Beyond A Reasonable Doubt That The Replacement Cost Offered By The State Was For Property That Was Similar In Quality, Design, And Value As That Alleged To Have Been Stolen; And Further Erred In Instructing The Jury That The State Did Not Have The Burden To Prove, Beyond A Reasonable Doubt, Facts Other Than Those Outlined By Specifically The District Court

A. Introduction

The district court in this case failed to instruct the jury that the State bore the burden of establishing, beyond a reasonable doubt, that the market value for the wire alleged to have been stolen could not be reasonably ascertained before the jury could use replacement value to measure the grade of the offense; and that the State also bore the burden of proof to establish that the replacement cost put forth by the State was for property that was similar in design, quality, and value as that alleged to have been taken. This error was compounded by the district court's use of a non-pattern jury instruction that informed the jurors that the State did not have to prove all of the facts in evidence beyond a reasonable doubt, and that district court would tell them what facts the State did have to prove beyond a reasonable doubt. Taken as a whole, the district court's instructions as given to the jury rose to the level of fundamental error that relieved the State of its burden of proof in this case.

B. Standard Of Review

The question of whether the jury was properly instructed is a question of law that this Court reviews de novo. *State v. Pearce*, 146 Idaho 241, 247, 192 P.3d 1065, 1071 (2008); *State v. Rolon*, 146 Idaho 684, 693, 201 P.3d 657, 662 (Ct. App. 2008). This Court reviews the jury instructions as a whole in order to determine whether the instructions fully and accurately reflect applicable law. *Rolon*, 146 Idaho at 693, 201 P.3d at 662.

C. The District Court Erred In Failing To Properly Instruct The Jury That The State Bore The Burden Of Proof To Establish That Market Value Was Not Ascertainable And Failing To Instruct The Jury That, In Order To Use Replacement Value, The State First Had To Establish Beyond A Reasonable Doubt That The Replacement Cost Offered By The State Was For Property That Was Similar In Quality, Design, And Value As That Alleged To Have Been Stolen; And Further Erred In Instructing The Jury That The State Did Not Have The Burden To Prove, Beyond A Reasonable Doubt, Facts Other Than Those Specifically Outlined By The District Court

As an initial matter, it should be noted that Mr. Johnson did not object to the district court's proposed jury instructions in this case. While ordinarily a party may not claim error in the court's jury instruction on appeal absent an objection prior to deliberations, certain claims of instructional error are reviewable for the first time on appeal under the fundamental error doctrine. *State v. Anderson*, 144 Idaho 743, 748, 170 P.3d 886, 891 (2007); *Rolon*, 146 Idaho at 693, 201 P.3d at 662. An instructional error is fundamental if it so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process. *Id.* "Jury instructions that fail to require the State to prove every element of the offense violate due process and, thus, rise to the level of a fundamental error." *Rolon*, 146 Idaho at 693, 201 P.3d at 662.

The district court in this case failed to instruct the jury that, before they could resort to the replacement cost put forth by the State in order to measure the grade of the offense, the State had to first prove, beyond a reasonable doubt, that: (1) the market value of the wires alleged to have been stolen could not be satisfactorily ascertained; and (2) the replacement cost proffered by the State was for property reasonably close in quality, design, and value as that alleged to have been stolen. (Tr., p.304, L.8 – p.315, L.4.) As previously noted, the State bore the burden of establishing these facts beyond a reasonable doubt because these facts were prerequisite findings to any valuation of the property alleged to have been stolen at a value of over $1,000 – the threshold finding for elevating Mr. Johnson's offense from a misdemeanor to a felony. *See Apprendi*, 530 U.S. at 490; *Mullaney*, 421 U.S. at 697-703; Point I(C) *supra.* Because the district court failed to inform the jury that the State bore the burden of proving these facts beyond a reasonable doubt, the court affirmatively relieved the State of its constitutional obligation of proof in this case.

This omission was exacerbated by another of the district court's instructions that informed the jury that, unless told otherwise by the court, the State did not have to prove any fact beyond a reasonable doubt. The district court provided the jury with a non-pattern instruction that:

> The instructions on reasonable doubt and the burden of proof to be carried by the State of Idaho *do not require the State to prove every fact and every circumstance in evidence beyond a reasonable doubt.* The burden of proof extends only to the material elements of the offense. *These material elements are set forth in the following instruction.*

(Tr., p.307, Ls.16-22; R., p.167.) (emphasis added.)

The "following instruction" referred to in the singular was an instruction on the elements of theft by possession of stolen property. (Tr., p.307, L.23 – p.309, L.2; R., p.168.) This instruction did not include the value element that established the grade of the offense. (Tr., p.307, L.23 – p.309, L.2; R., p.168.) In another instruction, the jury was informed that the State was required to prove, beyond a reasonable doubt, that the value of the property alleged to have been stolen was over $1,000 in value in order to convict Mr. Johnson of grand theft. (Tr. p.309, Ls.17-22; R., p.170.) However, as previously noted, the district court made no such instruction regarding the requirement that the State prove beyond a reasonable doubt that market value could not be satisfactorily ascertained and that the replacement cost put forth by the State bears a close relationship in quality, design, and value to the property alleged to have been stolen.

A similar instruction was criticized in the recent Idaho Court of Appeals decision in *State v. Rossignol*, ___ Idaho ___, ___ P.3d ___, 2009 WL 1637035 (Ct. App. 2009).[1] In that case, the district court instructed the jury that it would outline for the jury the elements of the offense that had to be established beyond a reasonable doubt, and also contained a similar provision that it was not necessary for the State "to establish every fact and every circumstance put into evidence beyond a reasonable doubt." *Id.* at *14. The defendant's challenge to the instruction was limited to the fact that the district court purported to outline the elements of the offense, but did not immediately do so. *Id.* at *13. The court in *Rossignol* found that, when read as a whole, the elements

[1] As of the writing of this brief, the opinion in *Rossignol* has not yet been released for publication in the permanent law reports and is therefore subject to revision or withdrawal.

instructions for the two charged offenses were ultimately provided to the jury, and therefore the court did not find error. *Id.* at 14. In doing so, however, the *Rossignol* Court also criticized the use of this instruction:

> ... we take this opportunity to reiterate that deviations from the pattern ICJI "have created unnecessary controversies with nothing added by way of clarity ... Trial courts are encouraged to avoid unnecessary appeals and controversy by utilizing the instruction that has an accepted history defining the burden the State bears."

Id. (internal citation omitted).

Here, the flaw with the instruction employed by the district court creates a different and much more serious problem – this instruction appears to have affirmatively informed the jury that the State did not have to prove a fact beyond a reasonable doubt unless the district court instructed them that this burden existed for that fact. This is an incorrect statement of the law that affirmatively relieved the State of its burden of proving facts that were necessary in order for Mr. Johnson to be found guilty of grand theft, as opposed to the lesser charge of petit theft. *See Apprendi*, 530 U.S. at 490; *Mullaney*, 421 U.S. at 697-703. As such, the district court's jury instructions in this case amounted to fundamental error because they relieved the State of its constitutional burden of proof.

D. The Instructional Error In This Case Was Not Harmless

This Court employs a constitutional harmless error test to cases where the district court erroneously omits an essential element from the instructions to the jury. *Rolon*, 146 Idaho at 693, 201 P.3d at 662. Under this test, an error cannot be deemed harmless if there is a reasonable possibility that the error complained of might have contributed to the conviction. *Anderson*, 144 Idaho at 749, 170 P.3d at 892. Relevant

to this determination is whether the evidence ot the omitted element was controverted at trial and whether the evidence was overwhelming. *Rolon*, 146 Idaho at 693, 201 P.3d at 662. The State bears the burden of showing that the error had no effect on a defendant's substantial rights. *Id.* at 694, 201 P.3d at 663.

Here, there was a dearth of any evidence that would support the two findings that the jury was never told the State had to prove beyond a reasonable doubt. Moreover, the issue of whether there was a market value and the appropriate measure of the market value was hotly contested throughout the proceedings, as was the issue of whether the replacement cost proffered by the State was for property that was a reasonably close approximation of that alleged to have been stolen. This is not a case where there was overwhelming and uncontroverted evidence that would have supported the pertinent findings.

Moreover, the Idaho Supreme Court has specifically noted that prejudice flowing from an omitted element may be exacerbated in light of the other instructions provided from the district court that minimized the importance of the element. *Anderson*, 144 Idaho at 748-749, 170 P.3d at 891-892. Here, the district court, in essence, excused the State from its burden of proof by informing the jury that the State did not have to prove, beyond a reasonable doubt, any fact unless they were told by the district court that the State bore the burden for that finding or element.

III.

The District Court Erred, And Violated Mr. Johnson's Constitutional Right To Present An Adequate Defense And To Compulsory Process, When The Court Excluded An Exculpatory Defense Witness As A Discovery Sanction

A. Introduction

Defense counsel was approached on the morning of the second day of trial by a potential witness – James Arterburn – that counsel had previously tried, unsuccessfully, to locate prior to trial. Defense counsel never provided notice to the State pursuant to I.C.R. 16 of this potential witness. The district court ruled that this witness would be excluded from trial based solely upon the lateness of the disclosure. However, the district court never engaged in the required analysis of balancing Mr. Johnson's right to a fair trial against the potential prejudice to the State, the State alleged no prejudice flowing from the possible introduction this witness' testimony at trial, and the district court failed to consider any potential lesser sanctions as a remedy for the discovery violation. Because the district court failed to act consistently with applicable legal standards, the district court abused its discretion when it excluded Mr. Arterburn from testifying in Mr. Johnson's trial.

Moreover, this error was not harmless because this was a largely circumstantial case in which Mr. Johnson's credibility was of central importance to his defense. And, in closing arguments, the prosecutor specifically highlighted and attempted to discredit those portions of Mr. Johnson's testimony that Mr. Arterburn could have corroborated with his own testimony.

B. Standard Of Review

This Court reviews the district court's exclusion of a witness as a sanction for a discovery violation for an abuse of discretion. *State v. Harris*, 132 Idaho 843, 846, 979 P.2d 1201, 1204 (1999); *State v. Lamphere*, 130 Idaho 630, 633, 945 P.2d 1, 4 (1997). Review for an abuse of discretion is a multi-tiered inquiry as to whether: (1) the district court correctly perceived the issue as discretionary; (2) the district court acted within the boundaries of its discretion and consistently with applicable legal standards; and (3) the district court reached its decision through an exercise of reason. *Harris*, 132 Idaho at 846, 979 P.2d at 1204.

C. The District Court Erred, And Violated Mr. Johnson's Constitutional Rights To Present An Adequate Defense And To Compulsory Process, When The District Court Excluded An Exculpatory Defense Witness As A Discovery Sanction Without First Weighing Any Potential Prejudice To The State Against Mr. Johnson's Right To A Fair Trial Or Considering Whether Any Lesser Sanctions Would Adequately Address The Discovery Violation

A criminal defendant has a constitutional right pursuant to the Compulsory Process Clause of the Sixth Amendment to offer the testimony of witnesses on his or her behalf and to present evidence in his or her own defense.[2] *Harris*, 132 Idaho at 846, 979 P.2d at 1204. Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," which is "an essential attribute of the adversarial system itself." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). The constitutional right to present a complete defense "is abridged by evidence rules that

[2] The constitutional protections of the right to compulsory process and to present a meaningful defense, as protected by the Sixth Amendment of the U.S. Constitution, are applicable on the states through the Fourteenth Amendment. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 409 (1988).

'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998)). However, in some circumstances, the district court may be permitted to exclude entirely the testimony of a defense witness as a sanction for a discovery violation. *Harris*, 132 Idaho at 846, 979 P.2d at 1204.

Under I.C.R. 16(c), upon a written request by the prosecuting attorney, the defense is required to disclose certain evidence that it intends to rely upon at trial, including, "a list of names and addresses the defendant intends to call at trial." I.C.R. 16(c). A defendant is required to file and serve a written response to a discovery request within 14 days. I.C.R. 16(e)(1). This rule also authorizes the district court to impose sanctions as a result of a party failing to comply with the rule. I.C.R. 16(e)(2).

Where the failure of defense counsel to comply with a valid discovery request and identify a witness is shown from the record to have been willful and intentional, complete exclusion of that witness' testimony can be appropriate regardless of other available sanctions short of excluding the witness. *Harris*, 132 Idaho at 846, 979 P.2d at 1204. However, in all other cases, the district court is required to weigh the prejudice that could be suffered by the State flowing from the late disclosure against the defendant's right to a fair trial. *Id; State v. Albert*, 138 Idaho 284, 288, 62 P.3d 208, 212 (Ct. App. 2002). Moreover, mere absence of good cause for the failure to timely provide notice of the witness "is not necessarily commensurate with 'willful' conduct." *Albert*, 138 Idaho at 288 n.2, 62 P.3d at 212 (quoting *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988)).

The Idaho Supreme Court decision in *State v. Harris* is particularly instructive for this Court. In *Harris*, defense counsel apparently neglected to provide any notice to the State of a potential defense witness at all prior to attempting to call the witness at trial. *Harris*, 132 Idaho at 845, 979 P.2d at 1204. The State objected to the calling of this witness due to the lack of notice, and asked that this witness be excluded from testifying at trial. *Id.* The district court then excluded the witness from testifying, despite acknowledging that defense counsel's failure to disclose the witness in a timely fashion was inadvertent. *Id.*

The Court in *Harris* determined that this was an abuse of discretion because, "the trial court did not weigh any prejudice that might be suffered by the State against Harris' right to a fair trial." *Id.* at 847, 979 P.2d at 1205. There, as in this case, the district court improperly relied solely on the lateness of the disclosure of the witness where there was no indication from the State as to how this late disclosure created any prejudice to the State's case. (Tr., p.253, L.11 – p.256, L.17.)

Additionally, in *Lamphere*, the Idaho Supreme Court explicitly noted the fact that the State failed to allege any prejudice on the basis of the late disclosure of the witness, but rather simply objected based on the lateness of the disclosure, when the Court determined that the district court abused its discretion when it excluded a defense witness as a discovery violation. *Lamphere*, 130 Idaho at 633-634, 945 P.2d at 4-5. This mirrors the nature of the State's objection in this case, which was limited to the timing of defense counsel's disclosure of the witness at the close of the State's evidence, and contains no assertion of whether or how the State would suffer any prejudice as a result of the untimely disclosure. (Tr., p.253, Ls.11-20.)

Moreover, in a serious felony case, "it is ordinarily the trial court's obligation 'to fashion a sanction which will impress counsel with the importance of responding to discovery requests, and yet will not prejudice the defense of the case.'"[3] *Albert*, 138 Idaho at 287, 62 P.3d at 211. The district court should also consider whether the discovery violation is attributable to defense counsel, rather than the defendant personally, prior to imposing the extreme remedy of complete exclusion of a witness from testifying at trial. *State v. Winson*, 129 Idaho 298, 303, 923 P.2d 1005, 1010 (Ct. App. 1996). While grand theft is normally not the most serious of felony offenses under Idaho law, it is important to remember that Mr. Johnson was also charged with being a persistent violator; and that, therefore, his conviction exposed him to upwards of a life sentence. (R., pp.48-50.) Because of the seriousness of the charges that Mr. Johnson was facing in this case, the district court was required to consider the adequacy of lesser sanctions prior to excluding completely Mr. Arterburn's testimony.

The district court in this case failed entirely to balance the potential prejudice to the State – or inquire as to whether there would be *any* prejudice to the State – based upon the late disclosure of Mr. Arterburn as a potential witness against Mr. Johnson's constitutional rights to a fair trial and to present a defense. Instead, the district court relied entirely on the lateness of this disclosure as the basis for excluding Mr. Arterburn's testimony. (Tr., p.255, L.12 – p.256, L.17.) The court also failed to consider whether there were any lesser sanctions that would be appropriate to address

[3] Common alternative sanctions are granting a short continuance so as to allow the State to interview the witness, declaring a mistrial, or imposing a fine against defense counsel. *See, e.g., Albert*, 138 Idaho at 289, 62 P.3d at 213; *State v. Thomas*, 133 Idaho 800, 803, 992 P.2d 795, 798 (Ct. App. 1999).

the discovery violation that were short of completely excluding the witness. In sum, the district court failed to follow clearly applicable legal standards in its determination to completely preclude Mr. Johnson from presenting the testimony of Mr. Aterburn in support of his defense.

D. The District Court's Error In Excluding Entirely The Testimony Of The Late Disclosed Witness Was Not Harmless

Where error concerns evidence improperly excluded at trial, "the test is whether there is a reasonable probability that the lack of the excluded evidence might have contributed to the conviction." *Harris*, 132 Idaho at 847, 979 P.2d at 1205. Relevant to consideration of this issue is whether the testimony that was excluded would have supported the account of events provided by the defendant in cases where credibility is of central concern. *Id.* at 847-848, 979 P.2d at 1205-1206.

In this case, Mr. Johnson's defense was, in large measure, comprised of his version of events that was provided through his testimony of the circumstances surrounding his sale of copper wire. As such, his credibility was of paramount importance in this case. Mr. Arterburn was a disinterested witness who could have supported Mr. Johnson's version of events, and therefore his credibility. In particular, Mr. Arterburn would have testified that: (1) he personally observed the two rolls of wire behind Mr. Johnson's brother's house that Mr. Johnson testified was the source of the wire he had sold on two occasions; and (2) that the reason that Randy Aterburn's name appeared on one of the sales receipts was that Mr. Arterburn and Randy Arterburn gave Mr. Johnson their permission to use their account at Pacific Steel and Recycling to sell the copper wire. (Tr., p.241, Ls.4-9; p.254, Ls.10-23.) Defense counsel also specifically

noted the importance of this testimony as it related to the degree to which the jury might give credence to Mr. Johnson's version of events. (Tr., p.254, Ls.10-17.)

Beyond the inherent importance of Mr. Arterburn's testimony, the absence of this testimony becomes of even greater significance given the prosecutor's closing remarks in this case. The prosecutor took advantage of the district court's exclusion of Mr. Arterburn's testimony by casting doubt on exactly those facts provided in Mr. Johnson's testimony that Mr. Arterburn could have corroborated. Notably, the prosecutor said the following:

> [Mr. Johnson] also said that he was bringing [the wire] in on his own, but on the 22nd when he brought that wire in from the railroad he had someone, a Jason or I can't remember his name, but a brother of Randy Arterburn whose name appears on the receipt from the 22nd on the top left-hand corner. What's that all about? Well, you can conclude that (A), he just happened to pick his friend up who took him to Pacific Steel and Recycling and said, hey, put that on our account, that's okay you can say we told you that you could sell that property for us.
>
> ...
>
> So why would Lonnie Johnson happen to run over some railroad wire near the tracks and then take it in with his friend and then say he was selling it for his friend's brother? How does that make any sense? *Maybe because he was trying to cover something up and make it look like it wasn't actually stolen property.*

(Tr., p.322, L.3 – p.323, L.6.)

Obviously, the jury in this case never heard anything at all from Mr. Arterburn, or even knew for certain that Mr. Arterburn really existed. Because the district court prevented Mr. Johnson from calling Mr. Arterburn as a witness, this provided an opportunity for the prosecutor in this case to imply that the presence of Mr. Arterburn's name on one of the receipts was somehow evidence of an attempt on Mr. Johnson's

part to deceive the recycling center as to the source of the copper, rather than being merely an expediency for purposes of processing the copper sale.

In addition, the prosecutor also attempted to cast doubt on Mr. Johnson's claim that he had found and sold copper wire present on his brother's property during the State's closing remarks. (Tr., p.323, L.14 – p.324, L.6.) Mr. Arterburn would have been able to testify, in corroboration of Mr. Johnson's testimony, that he had personally observed the rolls of copper wire on Mr. Johnson's brother's property. (Tr., p.241, Ls.4-9; p.254, Ls.10-23.) In a case where credibility was the sum and substance of the defense, exclusion of Mr. Arterburn's testimony as corroboration of the defense version of events cannot be said to have been harmless.

IV.

The Prosecutor Committed Misconduct Rising To The Level Of A Fundamental Error When She Referred To Mr. Johnson As A "Scavenger" And A "Buzzard;" And When She Mischaracterized The Substance Of Mr. Johnson's Testimony During Closing Arguments

A. Introduction

Mr. Johnson asserts that the prosecutor in this case committed prosecutorial misconduct, rising to the level of a fundamental error, when the prosecutor attempted to evoke the sympathies of the jury towards the railroad company, called Mr. Johnson names, and misstated the record of Mr. Johnson's testimony in this case.

B. The Prosecutor Committed Misconduct Rising To The Level Of A Fundamental Error When She Referred To Mr. Johnson As A "Scavenger" And A "Buzzard;" And When She Mischaracterized The Substance Of Mr. Johnson's Testimony During Closing Arguments

As an initial matter, Mr. Johnson did not object to the prosecutor's remarks at issue in this case. "When there is no contemporaneous objection, a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error." *State v. Gross*, 146 Idaho 15, 18, 189 P.3d 477, 480 (Ct. App. 2008). Prosecutorial misconduct rises to the level of a fundamental error when it is calculated to inflame the passions and prejudice of the jury against the defendant or is otherwise so inflammatory as to create the potential that the jury may be influenced to determine guilt on factors outside of the evidence. *Id; State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). However, in order to be deemed fundamental, the prosecutor's remarks, taken in the context of the entire closing argument, must be so egregious or inflammatory that a curative instruction to the jury would not have cured the prejudice. *Kuhn*, 139 Idaho at 715, 85 P.3d at 1114.

Here, there were two separate instances of prosecutorial misconduct, both of which rose to the level of a fundamental error. First, the prosecutor in this case attempted to engage the passion and prejudice of the jury, rather than arguing proper inferences from the evidence, when she attempted to engender the sympathy of the jury by portraying the railroad as a particularly vulnerable victim while simultaneously denigrating the defendant personally by calling him names. Second, the prosecutor misstated Mr. Johnson's testimony, and, in so doing, erroneously argued that he had admitted knowing the wire was stolen and was the railroad's property.

While both parties are generally given considerable latitude in closing arguments, it is improper for a prosecutor to employ inflammatory words when describing the defendant during closing arguments. *State v. Severson*, ___ Idaho ___, ___ P.3d ___, 2009 WL 1492659, *22 (2009).[4] In particular, prosecutors as quasi-judicial officers "*have a duty to ensure that defendants receive fair trials.*" *Id.* at *17.

"Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *Gross*, 146 Idaho at 20, 189 P.3d at 482. In this case, the prosecutor indisputably made such an appeal during closing arguments when she used derogatory language to describe the defendant and further attempted to engender and play on the jury's sympathies towards the railroad company as a "long celebrated industry" that is vulnerable because it is "in decline." (Tr., p.330, L.25 – p.331, L.8.) During closing argument, the prosecutor made the following remarks:

> On a new note, ladies and gentlemen, the railroad is a long celebrated industry, but it is definitely in decline. There is a lot of competition out there these days. There is [sic] semis, boats, planes, and most of all technology, but that doesn't make it okay for thieves to be targeting railroad property. Railroad lines are not for scavengers, and that is what the defendant is. *He is a scavenger. He is a buzzard. He is picking off the bones of the railroad industry.*

(Tr., p.330, p.25 – p.331, L.8.)

The prosecutor in this case referred to Mr. Johnson personally as a predatory animal and further denigrated him by calling him a "scavenger." While attorneys commonly make use of analogies in order to help the jury understand the law or the arguments of the parties, there is clearly a limitation on the use of analogy or metaphor

[4] As of the date of the writing of this brief, the opinion in *Severson* has not yet been released for publication in the permanent law reports and is subject to revision or withdrawal.

where such tactics overstep the bounds of permissible argument. The Idaho Supreme Court has recognized as much when the Court held that it is clearly improper for a prosecutor to refer to the defendant as a "murdering dog," and further condemned those statements. *State v. Hairston*, 133 Idaho 496, 507, 988 P.2d 1170, 1182 (1999). Similarly, Idaho courts have recognized that any argument that consists of calling the defendant names is improper. *See, e.g., Kuhn*, 139 Idaho at 716, 85 P.3d at 1115.

In addition, prosecutor's remarks that are designed entirely to evoke sympathy for the victim, rather than discuss pertinent evidence regarding the issues at trial, are also improper. *See, e.g., State v. Beebe*, 145 Idaho 570, 575-576, 181 P.3d 496, 501-502 (Ct. App. 2007). Here, the prosecutor's remarks about the celebrated nature of the railroad industry, and its current vulnerability due to its state of industrial decline, were in no way based on any evidence that was admitted at trial, nor are they relevant to the legal issues. The only purpose for such argument is to arouse and evoke the jury's sympathies. In context with the remarks calling Mr. Johnson a scavenging predator, these remarks were so inflammatory as to rise to the level of a fundamental error.

The prosecutor in this case also misstated Mr. Johnson's testimony. The prosecutor asserted that Mr. Johnson had made admissions with regard to the wire at issue in this case that he "knew it was probably stolen," and further indicated that Mr. Johnson and an employee of the railroad, "both I.D. the third batch [of wire] that came in as Union Pacific Railroad wire." (Tr., p.318, Ls.16-18, p.324, Ls.15-18.) In actuality, the admissions made by Mr. Johnson to Officer Milovanovic had to do with wire that was the subject of a different charge out of Lincoln County, and the substance of his admission was markedly different than was represented by the prosecutor in

closing arguments. (Tr., p.158, L.1 – p.162, L.15.) Mr. Johnson merely told the officer that he knew it was wrong for him to have picked up the wire prior to being arrested, which was an ambiguous statement at best and certainly not an admission that he had specific knowledge that the wire was stolen. (Tr., p.162, Ls.9-15.) More important, however, is that Mr. Johnson was speaking of wire that was found in his possession *after* he had sold the wire at issue in the instant case; and so he had never made any admissions at all about the wire he had previously sold which formed the basis of his criminal charges. (Tr., p.159, L.18 – p.160, L.1.)

Mr. Johnson also testified specifically that there was nothing that indicated to him that any of wire that was related to his charges at trial belonged to anybody, including the railroad. (Tr., p.299, L.23 – p.300, L.7.) "It is plainly improper for a party to present closing argument that misrepresents or mischaracterizes the evidence." *Beebe*, 145 Idaho at 575, 181 P.3d at 501. Because knowledge that the wire was stolen was an element of the charged offense, this misstatement of the evidence by the prosecutor created the false impression that the State had direct evidence in the form of a confession as to the element of Mr. Johnson's purported knowledge that the wire was stolen. *See, e.g., State v. Jones*, 125 Idaho 477, 489, 873 P.2d 122, 134 (1994) (direct evidence includes confessions of the defendant).

Moreover, the prosecutor's acts of misconduct during closing arguments were not harmless. Even where prosecutorial misconduct rises to the level of a fundamental error, "the conviction will not be reversed when that error is harmless." *Severson*, 2009 WL 1492659, *17. A prosecutor's remarks may be deemed harmless if the State presents such overwhelming evidence of the defendant's guilt such that that the

likelihood that the remarks contributed to the verdict is minimal. *Hairston*, 133 Idaho at 508, 988 P.2d at 1182.

In this case, the State's evidence was circumstantial, and cannot be said to have been so overwhelming that there is not a likelihood that the prosecutor's improper remarks contributed to the verdict. The Washington Court of Appeals case of *State v. Rivers* is instructive on this point. *State v. Rivers*, 981 P.2d 16, 17-19 (Wash. Ct. App. 1999). The prosecutor in *Rivers*, as did the prosecutor in this case, played on the sympathy of the jury by first casting the victim as helpless due to his state of intoxication. *Id.* at 17. The prosecutor then cast Mr. Rivers and his cohorts as "predators .. they are nothing more than hyenas." *Id.* At a later point in closing argument, the prosecutor against likened the defendant to another predatory animal, calling him a "jackal." *Id.* The *Rivers* Court determined that these remarks were an improper appeal to the passions and prejudice of the jury. *Id.* at 18.

In reviewing whether this error was harmless, the *Rivers* Court determined that it was not. Specifically, the court held that:

> The defendant's case hinged on his and his witness' credibility. The prosecutor attacked his credibility in an inappropriate manner, instead of adhering to his responsibility to utilize appropriate evidence that relates to the elements of the crime to persuade the jury that the State has met its burden of proof. Instead of focusing the jury's attention properly to the elements of the crime and the State's burden of proof, the prosecutor resorted to ill-conceived rhetoric aimed squarely at the jury's passions.
>
> We do not know whether the State would have succeeded without this inappropriate argument. We do know that this highly inappropriate conduct undermined the integrity of the criminal justice process to such an extent that justice was not done below.

Id. at 18-19.

Here, as in *Rivers*, Mr. Johnson's defense rested in large measure squarely on the shoulders of his credibility. The State's case was circumstantial, which made the credibility contest in this case even more central to the jury's verdict. In making improper arguments that impugned Mr. Johnson's character, and in misstating the substance of Mr. Johnson's testimony, the prosecutor resorted to improper and inflammatory tactics in order to induce the jury to reach a verdict outside of the proper bounds of the evidence in this case. The State also implied that there was an admission on the part of Mr. Johnson as to a critical element of the offense when, in fact, there was none. As such, the prosecutor's misconduct cannot be said to have been harmless.

V.

The District Court Erred When The Court Awarded Restitution In The Amount Of $2,000

A. Introduction

The district court erred when it awarded restitution in the amount of $2,000.

B. Standard Of Review

The decision as to whether to order restitution, and what amount of restitution to order, is within the district court's discretion. *Smith*, 144 Idaho at 692, 169 P.3d at 280. "When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to

the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason." *Id.*

C. The District Court Erred When The Court Awarded Restitution In The Amount Of $2,000

"Restitution may only be awarded for actual economic loss suffered by the victim." *Smith*, 144 Idaho at 692, 169 P.3d at 280 (citing I.C. §§ 19-5304(1)(a), (2)). Valuation of property for purposes of restitution, as with valuation of property for purposes of determining the gradation of a theft offense, is determined according to the fair market value of the property as opposed to the cost of replacement. *Id.*

As previously noted, the fair market value of the wires alleged to have been stolen was measured by the price that was paid by Pacific Steel and Recycling - $665.05. *See* Point I (C) *supra.* (*See also* Tr., p.242, Ls.3-4.) Because the district court awarded restitution in excess of the fair market value of the wire, the district court failed to follow the applicable legal standards attendant on its determination of restitution and thereby abused its discretion.

VI.

Proper Application Of The Cumulative Error Doctrine Requires Reversal In This Case

Finally, Mr. Johnson asserts that, even if the errors in this case are not deemed reversible when taken individually, in the aggregate, the errors in this case rose to the level of denying Mr. Johnson a fair trial. The doctrine of cumulative error requires the reversal of a conviction when there is, "an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show an absence of a fair trial, in contravention of the defendant's right to due process." *State v. Field*, 144 Idaho

559, 572-573, 165 P.3d 273, 286-287 (2007). Given the number of errors occurring in this case, the *cumulative effect of these errors operated to deprive Mr. Johnson of his* right to a fair trial. As such, proper application of the cumulative error doctrine requires reversal in this case.

CONCLUSION

Mr. Johnson respectfully requests that this Court reverse his judgment of conviction and sentence and remand his case for entry of a judgment of conviction and sentence for misdemeanor theft. In the alternative, he requests that this Court reverse his judgment of conviction and sentence and remand his case for further proceedings. In the alternative, Mr. Johnson respectfully requests that this Court reverse the district court's order of restitution and remand this case for further proceedings.

DATED this 29th day of June, 2009.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of June, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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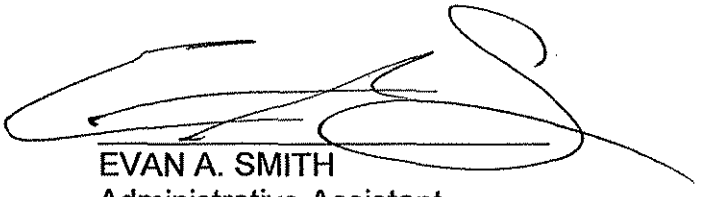

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